on § 251(d)(1) is utterly misplaced. Section 251(d)(1) has nothing to do with granting the Commission authority to do anything. It merely sets a time limit for tasks the Commission is otherwise given under the Act. The section is a limitation on the Commission's authority -- requiring it to act within a certain time -- not a grant of authority. Moreover, to the extent § 251(d)(1) confirms the FCC's ability to issue regulations, it does so only with respect to tasks expressly assigned to the FCC by the Act. Thus, for example, § 251(e) expressly directs the FCC to "create or designate one or more impartial entities to administer telecommunications numbering." Similarly, § 251(d)(2) acknowledges some role for the FCC in determining which "network elements" must be unbundled. Merely because § 251(d)(1) recognizes a function for the FCC in such discrete matters does not mean the FCC is authorized to issue new rules on matters in which it was not given any role in the statute.

To the contrary, if anything, § 251(d) confirms that the FCC has no authority to determine prices. While it expressly articulates the substantive standards the FCC must apply in considering any rules pertaining to unbundling of network elements, § 251(d) makes no reference to standards governing pricing. Rather, the substantive standards Congress applied to pricing are found only in § 252(d)(1), which dictates the standards state commissions should apply in arbitrations. Thus, by both including substantive standards to govern any FCC rules on unbundling and omitting any standards for pricing, § 251(d) itself strongly confirms that Congress did not intend the FCC to have any role in setting prices.

2. Section 2(b) of the Communications Act confirms that the 1996 Act cannot be construed to give the FCC authority over pricing.

As the explicit text and structure of the Act outlined above make clear, the FCC's claim to authority over pricing rests on a wholly untenable reading of the Act. Indeed, since the Act explicitly assigns authority over pricing to state commissions, there is no silence or ambiguity in the statute that might entitle the FCC to claim deference for its interpretation under the principles of Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). The principle of Chevron deference offers the FCC no aid in this case for another, independent reason. Section 2(b) of the Communications Act of 1934 provides what the Supreme Court has described as "its own rule of statutory construction" with respect to the jurisdiction of the FCC to regulate intrastate communications services. See Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 377 n.5 (1986). Section 2(b), in other words, operates as a counter-Chevron rule of construction when the FCC is determining the scope of its jurisdiction over intrastate communications. That rule puts a final nail in the coffin for the FCC's power grab over prices.

Section 2(b) provides that "nothing in this Chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service." 47 U.S.C. § 152(b) (1994). This "congressional denial of power to the FCC" over prices and other matters concerning local telephone service can be overcome only if Congress includes "unambiguous" and "straightforward" language in the Act either modifying § 2(b) or expressly granting the FCC additional authority. See Louisiana Pub. Serv. Comm'n, 476 U.S. at 375, 377.

Obviously, neither exception to § 2(b) is present here. Whatever else might be said of § 251(d)(1), that section does not "unambiguous[ly]" and "straightforward[ly]" give the FCC the authority to set prices for interconnection, network elements and services. Similarly, no provision in the 1996 Act expressly modifies § 2(b) to grant the FCC authority to regulate either prices or other local matters under § 251. To the contrary, such a provision was expressly rejected by Congress, for while it was included in the Senate bill, it was not included in the law as enacted. See S. 652, 104th Cong., 1st Sess. § 101(c) (1995). Indeed, even the FCC concedes that no provision of the 1996 Act "contain[s] an explicit grant of intrastate authority to the [FCC]." First Report and Order ¶ 84.

The FCC's only response to the fatal limitations on its jurisdiction in § 2(b) is the assertion that because the 1996 Act purportedly "moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act," id. ¶ 24, the Commission's rulemaking powers under § 251 should "take precedence over any contrary implications" in § 2(b), id. ¶ 93. But that "reasoning" is plainly flawed at a number of levels.

As noted above, there is simply no grant of authority to the FCC over prices in § 251 to "take precedence" over the rule of § 2(b). In addition, the FCC has the relationship between § 2(b) and subsequent legislation such as the 1996 Act flatly backwards. The Supreme Court has made clear that § 2(b) deprives the FCC of jurisdiction over intrastate communications services unless a later act expressly modifies § 2(b) or expressly grants the FCC such power. See Louisiana Pub. Serv. Comm'n, supra. The FCC's general sense that the 1996 Act impliedly "moves beyond" the jurisdictional limitations in § 2(b) cannot overrule the explicit "congressional denial of power to the FCC" in § 2(b).

Moreover, the FCC's reading of § 251 to imply some basic change in the jurisdictional framework set forth in § 2(b) rests on a clear logical flaw. The FCC assumes that if § 251 applies to issues involving solely the local exchange, it must also necessarily imply a grant of jurisdiction to the FCC to regulate the same matters. See First Report and Order ¶ 93. But there is no basis for that logical leap. To the contrary, § 2(b) is phrased in the disjunctive -- it directs that nothing in the Act should be construed "to apply" or "to give the FCC jurisdiction with respect to" intrastate communications. While § 251 may apply by its terms to some matters affecting solely intrastate communications, it nowhere expressly grants the FCC jurisdiction over the same subjects. Since the Act clearly enlists the aid of state commissions to implement its mandates, there is no reason to assume that by merely addressing some intrastate matters, the Act must effect a radical rearrangement of the jurisdictional division between the FCC and the States.

B. By Setting Rates Through an Abbreviated Rulemaking, the FCC Short-Circuited the Fact-Specific, Adjudicative Process Required by the Act for Setting Prices and Produced Arbitrary and Capricious Results.

Congress's decision to give authority over pricing exclusively to state commissions is not simply a jurisdictional technicality devoid of substantive import. To the contrary, the role assigned to state agencies is inextricably linked with the procedures Congress devised in § 252 for setting prices based on a LEC's costs. By design, the arbitrations required by the Act were to be evidentiary proceedings involving fact-specific, essentially adjudicative examinations into the circumstances of particular carriers. The arbitrations thus require local supervision by individual state commissions.

By claiming authority over pricing for itself and by using a rulemaking to set both presumptive proxy prices and mandatory pricing rules to govern state decisions, the FCC has completely circumvented the procedures designed by Congress. In addition, by attempting to use the record compiled in an expedited rulemaking to accomplish pricing decisions that Congress expected to be handled through adjudicative proceedings, the FCC has only committed further errors and produced results that cannot meet the standards of reasoned decisionmaking.

In attempting to dictate standardized prices, the FCC erred first and foremost by undermining the procedures Congress established for individualized, adjudicative pricing determinations under the Act. Section 252 makes clear that an arbitration will proceed on the basis of a "petition," to which a party is given an opportunity to respond. Both parties are allowed an opportunity to present "information" to the state commission bearing on the petition, and only issues set forth in the petition and response are to be "resolved" by the state commission. See generally § 252(b) . Such an evidentiary proceeding is especially critical to ensure that prices adequately account for the true costs incurred by a particular incumbent carrier. Only such a case-specific, localized procedure could fulfill the statutory command that prices be "based on . . . cost." See § 252(d)(1). See also § 252(d)(3).

The FCC, however, utterly ignored these procedures by attempting to use a rulemaking (and an abbreviated one at that) not only to dictate an inflexible pricing regime, but also to set specific prices. The expedited rulemaking employed by the FCC could hardly be further from the individualized decisionmaking called for in the Act. Parties, after all, were not even given an opportunity to comment on the FCC's final rule or the specific proxy prices the FCC selected before the final numbers were published. In relying on such a proceeding to set prices, the FCC improperly eliminated the case-specific decisionmaking that Congress devised. See Natural Resources Defense Council, Inc. v. Herrington, 768 F.2d 1355, 1396 (D.C. Cir. 1985) ("[A]n agency may not ignore the decisionmaking procedure Congress specifically mandated because the agency thinks it can design a better procedure.").

The destructive impact of the FCC's actions does not end there. The rules the FCC has promulgated will preclude state arbitrations from ever becoming the localized, case-specific adjudications envisioned by Congress. For example, by prohibiting state commissions ab initio from even considering historical costs in determining prices, the FCC has skewed any individualized decisionmaking in the arbitrations. Similarly, by setting presumptive proxy prices, the FCC has foreclosed meaningful case-by-case consideration in arbitrations. It is no answer to these concerns to suggest that the proxy prices are not mandatory and supply only a fall-back solution where States fail to use more specific cost studies. Rather, as the FCC itself has made clear, unless they have approved incumbent LEC cost studies following the FCC's methods, States must apply the proxy prices to meet arbitration deadlines under the Act. See First Report and Order ¶ 619. Moreover, as the submissions of several parties in arbitrations already demonstrate, state commissions are being urged to adopt the FCC's proxy prices immediately to simplify their tasks and to avoid any delays that might accompany the review of cost studies. See Affidavit of Donald W. McLeod ¶ 14 ("McLeod Aff.") (attached to the Joint Motion of GTE Corporation and The Southern New England Telephone Company for Stay Pending Judicial Review ("Joint Motion") before the FCC, attached at Tab E). In fact, at the urging of AT&T, an administrative law judge in California has recently determined that prices in the arbitration between AT&T and GTE will be set according to the FCC's proxies since it would be too inconvenient to work with actual cost studies. Indeed, even though GTE has already prepared and offered cost data in California, this ruling will focus the arbitration instead on simply applying the proxy prices.[8] As this result plainly shows, the FCC's proxies have the perverse effect of forestalling the use of specific cost studies in state arbitrations and precluding the sort of case-specific consideration Congress intended.

Not surprisingly, the FCC's efforts to supplant the adjudicative process devised by Congress with the agency's own ersatz pricing procedures have spawned clear substantive errors. By basing its conclusions on the materials generated in an abbreviated rulemaking, the FCC produced glaringly arbitrary results. For example, the FCC acknowledged that some incumbent

[8] GTE intends to seek review of these decisions immediately before the California Public Utilities Commission.

LECs claimed in comments that they had "made certain historical investments required by [state] regulators that they have been denied a reasonable opportunity to recover in the past." First Report and Order ¶ 707. Nevertheless, the FCC determined that States could not even consider historical costs in setting rates and justified that decision in part on the ground that "[t]he record before us . . . does not support the conclusion that significant residual embedded costs" would be left unrecovered by a forward-looking pricing mechanism. Id. ¶ 707. But the only reason the record contains little evidence on this point is that the FCC circumvented the case-specific evidentiary proceedings in which such evidence could be introduced. In fact, GTE has been compiling precisely such evidence and has already offered it to the California Public Utilities Commission, which is in the midst of determining the magnitude of GTE's unrecovered historical costs. The evidence the FCC claimed was lacking thus not only exists, but is currently being presented in the fora designated by Congress -- the state arbitration proceedings. For the FCC to justify its decisions based on a supposed lack of such evidence after the FCC itself evaded the process by which a record with such case-specific materials could properly have been built is nothing short of Kafkaesque.

Further examples of arbitrary action appear in the FCC's explanations for its proxy prices. Those prices were based on cost studies conducted by several states and on cost models proposed by parties. See First Report and Order ¶¶ 792, 811-14. The FCC erred in its use of both the state cost studies and the cost models.

First, after outlining a detailed method for measuring costs, the FCC proceeded to set prices based on state studies that used different methods, an error best illustrated by the selection of prices for unbundled loops. The FCC determined as a general matter that prices should be set based on the "total element long run incremental cost" ("TELRIC") of providing a particular network element plus a reasonable allocation of joint and common costs.[9] The cost studies used for loop prices, however, and particularly the Florida studies, were not based on the FCC's new "TELRIC-plus an allocation for joint and common costs" method. To the contrary, the Florida studies used a measure of costs known as "total service long run incremental cost" ("TSLRIC") and omitted any significant contribution for joint and common costs. See Affidavit of Dennis B. Trimble ("Trimble Aff.") ¶¶ 5-14 (attached to Joint Motion at Tab E). As the FCC itself has explained, TSLRIC systematically produces lower cost estimates than the FCC's TELRIC method because it fails to capture as many joint and common costs and assign them to a particular service or element. See First Report and Order ¶ 695. In addition, unlike the FCC's stated method, the Florida studies did not require a further allocation of joint and common costs on top of the incremental costs that could be specifically assigned to loops. Despite these obvious discrepancies, the FCC made no effort to explain how the studies from Florida might properly be used in setting rates that would comply with the FCC's declared approach.

The Commission compounded its error by choosing, again without explanation, a proxy rate for Florida that cannot logically be reconciled with the very studies on which the FCC purportedly relied. The Florida commission approved loop prices that produced an overall state weighted average price of $17.28. Given the methods used in the Florida cost studies, the FCC's announced pricing method by definition would logically require an average loop price greater than $17.28. Nevertheless, without any further explanation linking the price it selected

[9] TELRIC identifies the forward-looking costs attributable to an entire element in a LEC's network. Thus, in one sense, it identifies the costs that would be avoided if the LEC eliminated that element from its network. While some joint and common costs of the network that can be specifically allocated between discrete elements are included in TELRIC, the FCC recognized that TELRIC alone would leave substantial joint and common costs unrecovered and thus required that an additional "reasonable allocation" of joint and common costs be considered on top of TELRIC in determining prices. See First Report and Order ¶¶ 694-696.

to the Florida studies (or linking the studies to its own pricing rules), the FCC set the average proxy rate for loops in Florida at $13.68 -- more than 20% below the average rate set by Florida. By declining to offer any rationale to explain this facially illogical result, the FCC utterly failed to live up to the requirements of reasoned decisionmaking. See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).[10]

Second, as explained more fully in the Supplemental Affidavit of Dennis B. Trimble ("Supp. Trimble Aff.") ¶¶ 8-11 (attached at Tab B), the FCC also acted arbitrarily by deriving its loop proxy prices from two cost models, the so-called "Benchmark Cost Model" and the "Hatfield 2.2" cost model, that the Commission itself expressly acknowledged "were submitted too late in this proceeding for the Commission and parties to evaluate them fully." First Report and Order ¶ 835. See id. ¶ 794 (relying on same cost models in fixing loop proxies). These models, moreover, systematically understated incumbent LECs' costs by excluding the costs of several essential components of the loop element. See Supp. Trimble Aff. ¶ 9.

C. In Any Event, the National Pricing Rules Imposed By the FCC Are Plainly Inconsistent With the Act and the Constitution.

Even if the Act could be construed to give the FCC authority over pricing, and even if the FCC had followed appropriate procedures under the Act, the specific rules set by the

[10] Similarly, for unbundled switching prices, the Commission failed to provide any explanation for the discrepancies between the evidence on which it was relying and its own definitions of the switching element and the proper measure of costs. As defined by the FCC, unbundled switching includes not only the basic function of connecting lines and trunks but also the full range of "features, functions, and capabilities of the switch," First Report and Order ¶ 412. The studies on which the FCC relied to set proxy prices, however, examined solely the costs associated with the basic function of trunk-to-line switching of additional minutes of traffic from an interconnecting carrier across the switch. See, e.g., Trimble Aff. ¶¶ 17, 18. The studies, thus, did not even purport to address the costs of other functions of the switch -- such as the special calling features the Commission purported to include. See Trimble Aff. ¶¶ 9, 15-20; Affidavit of Timothy J. Tardiff ("Tardiff Aff.") ¶¶ 2-14.

Commission are plainly unlawful. The FCC's rules not only prohibit States from even considering an incumbent LEC's actual historical costs, but also effectively deny LECs an opportunity to recover their full forward-looking costs. Neither result can be squared with the plain terms of the Act or with the Constitution.

1. The FCC's rules unlawfully prohibit States from even considering an incumbent LEC's historical costs in setting prices.

The Commission premised its pricing rule on the astonishing conclusion that States must be precluded from setting prices under § 252 that allow incumbent LECs to recover the historical costs of their networks -- i.e., to recover their actual investment in their existing infrastructure. See First Report and Order ¶¶ 704-707. Rather, the FCC concluded that States must "set [prices] at forward-looking long run economic cost." Id. ¶ 672. This conclusion runs afoul of the plain meaning of the Act and interprets the Act in a manner that would unnecessarily raise grave constitutional concerns.

The Act provides that in determining the prices for interconnection and network elements, state commissions should set a "just and reasonable rate" that is "based on cost" and may include a "reasonable profit." § 252(d)(1) (emphasis added). By its plain terms, § 252(d)(1) does not limit the kind of "cost[s]" a State may consider to forward-looking, or any other type, of cost. Rather, the Act directs States to set prices based on all costs of the incumbent LEC. The term "cost" in § 252(d)(1) thus no more excludes "historical costs" than the term "parents" would exclude mothers.[11] Astonishingly, the FCC concedes that the pricing standard specified by § 252(d)(1) "does not specify whether historical or embedded costs should be considered or

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[11] Moreover, by expressly providing that prices may include a "reasonable profit," the Act plainly contemplates that States may set prices to recover all of a LEC's costs, including the actual investments the LEC has already made in its network. After all, there could be no question of achieving profit if prices did not first fully recover all actual costs.

whether only forward-looking costs should be considered in setting arbitrated rates." First Report and Order ¶ 705. That concession should be the end of the line for the FCC's efforts to foist its pricing rules on the States. If the statutory standards governing pricing do not prohibit the States from considering historical costs, the FCC simply has no authority to eliminate such costs from the pricing calculus.

The FCC's categorical exclusion of historical costs not only conflicts with the plain terms of the Act but would also raise grave constitutional concerns. It is well settled that the Fifth Amendment "protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory." Duquesne Light Co. v. Barasch, 488 U.S. 299, 307 (1989). As the Supreme Court has explained, the Constitution thus requires that a utility be permitted to charge rates that will allow it to "maintain its financial integrity, to attract capital, and to compensate its investors for the risk [they have] assumed." Id. at 310 (quoting FPC v. Hope Natural Gas Co., 320 U.S. 591, 605 (1944)). At a minimum, this standard requires that a regulated entity be allowed an opportunity to recover the actual costs it has prudently incurred in constructing the facilities it operates for public use. If a company could not even recover its actual capital outlays, it obviously could provide no return to investors, and thus could not possibly meet the constitutional standard. See Tenoco Oil Co. v. Department of Consumer Affs., 876 F.2d 1013, 1020 (1st Cir. 1989) (to meet constitutional standard "rates must provide not only for a company's costs, but also for a fair return on investment").

The Court's conclusion in Duquesne that constitutional analysis should focus only on the "total effect" of a rate order, rather than on the method of setting rates, in no way detracts from this principle. In concluding that the "subsidiary aspects of valuation" used in ratemakings are not of constitutional dimension, Duquesne, 488 U.S. at 310, the Court did not by any stretch suggest that a method for setting rates whose "total effect" was to deprive the regulated entity of any opportunity to recover its actual costs could pass constitutional muster. To the contrary, as Justice Scalia explained, since the constitutional standard requires that a utility be allowed a "fair return on investment," whatever method may be used in setting the rate, in judging the ultimate effect of the rates set by that method, there must be some minimum measure of the investment against which returns may be judged to be "fair." Duquesne, 488 U.S. at 317 (Scalia, J., concurring). And for that purpose, under the Constitution, "all prudently incurred investment may well have to be counted." Id. See also Duquesne, 488 U.S. at 310 (noting that the amount of capital upon which investors are entitled to earn a fair return has "constitutional overtones"). Indeed, as the Court's prior decisions holding that a company may not be forced to operate at a loss establish, a regulated entity must be allowed rates that will cover all of its actual costs. See, e.g., Brooks-Scanlon Co. v. Railroad Comm'n, 251 U.S. 396, 399 (1920) (Holmes, J.); cf. also Northern Pac. Ry. v. North Dakota, 236 U.S. 585, 596 (1915) (noting that a railroad cannot be forced to operate at less than cost and that "we entertain no doubt that, in determining the cost of the transportation of a particular commodity, all the outlays which pertain to it must be considered"); id. at 597 ("[W]hen conclusions are based on cost, the entire cost must be taken into account.").

Here, in contrast, the FCC's pricing method ensures that the prices imposed on incumbent LECs completely disregard the constitutional standard. By selecting a rate-setting mechanism that explicitly bars from consideration the basic criterion against which the validity of the rates must ultimately be judged -- historical costs -- the FCC's order raises grave constitutional concerns.

Under familiar principles of statutory construction, the Act must be read to avoid the constitutional question that would arise if Congress had authorized the FCC to prohibit LECs from recovering their actual historical investment. See, e.g., Rust v. Sullivan, 500 U.S. 173, 190-91 (1991); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Precisely to avoid running afoul of constitutional concerns, where an act of Congress specifies that a regulated business should be allowed a "just and reasonable" rate, such language is universally construed to require compensation sufficient to meet constitutional standards. See, e.g., FPC v. Hope Natural Gas Co., 320 U.S. 591, 595 (1944); see also Jersey Cent. Power & Light Co. v. FERC, 810 F.2d 1168, 1175 (D.C. Cir. 1987) (explaining that congressional standard "coincides with that of the Constitution"). That same construction must be applied to the 1996 Act -- to allow the LECs the opportunity to recover as much of their actual, historical investment as the market will allow. And, most certainly, the Act may not be interpreted to prohibit the States from even considering whether to allow LECs to recover some of their unrecovered historical costs.

2. The FCC's rules unlawfully deny LECs an opportunity to recover their true forward-looking costs.

The national pricing regime imposed by the FCC is invalid for another independent reason: it does not even allow LECs an opportunity to recover their full forward-looking costs. The term "cost" in § 252(d)(1) must be read to ensure that a LEC is permitted an opportunity to recover all of its true costs. Cf. Hope, 320 U.S. at 595; see also Jersey Cent. Power & Light, 810 F.2d at 1175. Indeed, the Constitution requires that a LEC be permitted to recover full costs in each segment of its business. It has long been settled that a regulated enterprise cannot be required to sell a line of service below cost on the theory that profits from another aspect of its business -- particularly an unregulated line of its business -- will compensate for the confiscatory rates. See, e.g., Brooks-Scanlon, 251 U.S. at 399 (Holmes, J.); see also Norfolk & W. Ry. v. Conley, 236 U.S. 605, 609 (1915) (explaining that a common carrier may not be required to transport a "commodity or class of traffic" at "less than cost").

The rule adopted by the Commission, however, falls woefully short of meeting the constitutional standard by failing to allow an incumbent LEC to recover even its true forward-looking costs. The FCC has dictated that a LEC's forward-looking costs must be based not on the LEC's "existing network design and technology," see First Report and Order ¶ 684, but rather on the costs of a hypothetical network constructed with the "most efficient technology," given the LEC's current wire center locations. Id. ¶ 685. By ignoring the technology a LEC may actually have deployed in favor of a hypothetical most-efficient alternative, this rule ensures that costs will be understated.

In addition, the FCC does not allow LECs to recover their full joint and common costs. The so-called "reasonable allocation" of forward-looking joint and common costs, First Report and Order ¶ 672, that the Commission includes in its pricing rule in fact ensures that a large portion of LEC's joint and common costs will go unrecovered. The FCC determines that it would be reasonable "to allocate only a relatively small share of common costs to certain critical network elements, such as the local loop and collocation, that are most difficult for entrants to replicate," but that it would be unreasonable to allocate common costs "in inverse proportion to the sensitivity of demand for the various network elements and services." Id. ¶ 696. In other words, in more plain English, the LECs are free to allocate joint and common costs to network elements on which they will not be able to recover those costs (because of the availability of competition for those elements), but are not allowed to allocate significant common costs to those elements on which the LEC has a good chance of recovering them in the marketplace.

In reality, the FCC's "reasonable allocation" rule prevents LECs from recovering a large portion of their joint and common costs.

II. GTE WILL SUFFER IRREPARABLE HARM ABSENT A STAY.

If it is allowed to take effect, the Commission's rules will immediately cause irreparable harm to GTE in at least two material respects. First, they will have an immediate and irreversible adverse impact on scores of negotiations and binding arbitration proceedings in which GTE is currently involved pursuant to § 252. Second, by requiring States in such arbitration proceedings to impose below-cost prices on incumbent LECs, the rules will subsidize the entry of inefficient carriers and will thereby cause GTE to suffer extensive and irremediable losses of customers, revenue and goodwill before this Court can review the validity of the Commission's action.

A. The Commission's Order Will Immediately Dictate the Terms of Ongoing Voluntary Negotiations and State Arbitrations.

The Commission's order -- and particularly its pricing standards -- will immediately short-circuit the § 252 negotiations and arbitrations currently under way. By providing a detailed set of default terms, the order will sweep a host of key issues off the bargaining table. For example, the Commission's default pricing levels will remove virtually any incentive a requesting carrier may have to negotiate over price by fixing a baseline from which bargaining can move in only one direction -- down. See McLeod Aff. ¶ 9. Indeed, the Commission has candidly acknowledged that its rules "may serve as a de facto floor or set of minimum standards" that channel negotiations, NPRM, Fed. Reg. 18311-03, at ¶ 20 (CC Docket No. 96-98) (Apr. 19, 1996), and has declared that "[t]he default proxies we establish will, in most cases, serve as presumptive ceilings." First Report and Order ¶ 768. Given the Commission's own predictions, there can be no doubt the rules will have an immediate impact on negotiations and arbitrations by denying GTE an opportunity to bargain for prices that are higher than those dictated by the Commission. In fact, even before the rulemaking was complete, the mere expectation that the rules would soon be in place had a marked detrimental effect on the bargaining process.[12]

The rules' stifling effect will only be aggravated by the Commission's conclusion under § 252(i) that requesting carriers must be granted access to any individual interconnection, service or network element on the same terms given any other carrier. See First Report and Order ¶ 1314. This radical "most favored nation" requirement will strangle meaningful negotiations by dictating that any concession made by an incumbent LEC as part of an integrated agreement must be automatically available to all requesting carriers without regard to the other terms of the bargain. See McLeod Aff. ¶ 9.

The impact of the Commission's rules will also be further exacerbated by the strict timetables imposed by the Act. After a carrier requests interconnection with an incumbent, that carrier and the incumbent have only 135 days to negotiate an agreement before either party may seek binding arbitration. See § 252(b)(1). Once requested, arbitration must be concluded within nine months of the original interconnection request. See § 252(b)(4)(c). GTE is currently in the midst of negotiating dozens of agreements pursuant to § 252(a)(1) in 28 States. McLeod Aff., Ex. 1. In several instances, the initial 135-day period has already expired, see id.; in others, the 26-day period during which petitions for arbitrations must be filed (160 days following the start of negotiations) has run or will soon run, see id.; and in still others

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[12] For example, after weeks of serious negotiations, a comprehensive understanding between GTE and Sprint was scuttled in part because it was anticipated that the Commission's proxy prices would give Sprint more advantageous terms than it could negotiate from GTE. See McLeod Aff. ¶ 11.

arbitrations have already been requested and must be resolved by as early as November 8, 1996. McLeod Aff., Ex. 2.[13] In those arbitrations, state commissions will be required to impose the default prices mandated by the Commission unless they can first approve completed cost studies consistent with the Commission's methods. See First Report and Order ¶ 619.

Moreover, certain requesting carriers, such as AT&T, are urging state commissions simply to impose the FCC's proxy prices on GTE immediately rather than undertaking such studies. See McLeod Aff. ¶ 14. AT&T, in fact, has already succeeded in having that position adopted in the arbitration proceeding between GTE and AT&T in California. In an oral ruling, an administrative law judge recently determined that rates in California will be set using the FCC's proxies since it would be too inconvenient to work with actual cost studies in the time available. Thus, while GTE has already prepared and offered cost data in California, under this ruling the arbitration will focus instead on applying the FCC's proxy prices. As this experience already shows, the FCC's proxies and the impending deadlines imposed by the Act simply put inexorable pressure on the parties and the States to treat the FCC's rules as the presumptive terms for the entire agreement.

As a result, if the rules are not stayed pending review, GTE will be left with two uninviting alternatives. GTE may enter into "privately negotiated" agreements whose terms are, in reality, dictated by the Commission's rules, or it may wait to have similar terms imposed on it by state commissions acting pursuant to the FCC's diktat. In the event some of the rules are later struck down, GTE will have lost forever the opportunity to negotiate with competing carriers free from the influence of the Commission's unauthorized set of presumptive terms.

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[13] For example, arbitrations with AT&T in virtually all GTE States must be resolved by December 12, 1996. See McLeod Aff., Ex. 2.

The loss of such bargaining opportunities in itself constitutes a classic form of irreparable injury. See Carson v. American Brands, Inc., 450 U.S. 79, 87-88 & n.14 (1981) (loss of opportunity to compromise Title VII claims on mutually agreeable terms as preferred by Congress is irreparable); Local Division 732, Amalgamated Transit Union AFL-CIO v. Metropolitan Atlanta Rapid Transit Auth., 519 F. Supp. 498, 500 (N.D. Ga. 1981) (lost bargaining opportunities constitute harm of an irreparable nature), vacated on other grounds, 667 F.2d 1327 (11th Cir. 1982).

If the current rules are overturned, moreover, it will not be possible to undo the harm to GTE. Even if it might be possible to reopen negotiations, it would be impracticable, if not impossible, to undo the effects the Commission's order will have on scores of agreements negotiated or arbitrated under its shadow. Once agreements dictated by the rules are in place, companies will structure a range of business plans around those agreements. See Affidavit of Barry W. Paulson ("Paulson Aff.") ¶¶ 5-7 (attached to Joint Motion at Tab E). Customer expectations under new service arrangements similarly will solidify. Once these changes take place, it will not be possible for parties simply to scrap working arrangements to go back to square one under a new set of rules.

B. The Commission's Rules and Pricing Standards Will Result in a Substantial and Irremediable Loss of Customers, Goodwill and Revenue.

As soon as it becomes effective, the national pricing regime promulgated by the Commission will begin subsidizing competitors at GTE's expense, thereby causing GTE to suffer irremediable losses in customers, goodwill and revenue. As outlined above, the Commission's pricing regime systematically requires incumbents to offer requesting carriers prices below actual costs. The Commission's rules will thus artificially allow entry by competitors whose own inefficiencies will be, in effect, subsidized by below-cost pricing. See Affidavit of Orville D.

Fulp ("Fulp Aff.") ¶ 5 (attached at Tab C). The result will necessarily be a loss of customers and revenue unrelated to efficient competition, and such losses will be effectively impossible for GTE to recapture. See Affidavit of Donald M. Perry ("Perry Aff.") ¶¶ 6-9 (attached at Tab D).

The default proxy prices the Commission has set for unbundled loops and switching ensure that GTE cannot come anywhere close to recovering its "total element long run incremental costs" for loops and switching, even where the TELRIC amounts for those elements are calculated purely according to the FCC's own chosen methodology, and even when no additional allocation of joint and common costs is included. See Supp. Trimble Aff. ¶¶ 6, 12 - 19 (attached at Tab B).

Competitors that obtain access to unbundled loops and switching at anything approaching the Commission's artificial prices will be able to offer local service at a substantial discount from GTE's rates, thereby ensuring that GTE will suffer a loss in market share. This artificial advantage will be particularly keen for numerous competing carriers that already have certain facilities, such as switches, in place. See Fulp Aff. ¶¶ 5-10, 14. Such competitors are well-poised to take immediate advantage of the Commission's price subsidies, particularly in urban areas where they can rapidly win over lower-cost, higher-profit customers. See id. ¶¶ 8-9, 14. The demand for local service is such that a rival who offers even a slight discount from an incumbent's rates can cause the incumbent to suffer a substantial loss in market share. See Perry Aff. ¶¶ 6-7. Taken together, the Commission's various below-cost pricing rules will result in substantial and rapid losses of market share for GTE, and the losses resulting from this subsidized competition will be permanent. See id. ¶¶ 8-9.

In addition to the number of lost subscribers, incumbent LECs like GTE will suffer nonquantifiable injury to customer goodwill as a result of the Commission's order. The

Commission's pricing rules will artificially subsidize rivals and allow them to undercut an incumbent's prices even if they cannot provide any greater efficiencies. See Fulp Aff. ¶ 5. The new competitors' ability to offer lower rates, in turn, will seriously harm the incumbent's reputation and customer goodwill since customers will naturally perceive higher prices as a sign of inefficiency. Such unrecoverable losses of goodwill are routinely recognized as a form of irreparable injury justifying a stay. See, e.g., Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 552 (4th Cir. 1994).[14]

Finally, to the extent GTE begins providing services or access pending appeal under pricing standards that are later struck down, GTE will incur substantial permanent losses. Obviously, as they lose customers to competitors who pay only the below-cost prices set by the Commission, incumbents such as GTE will lose retail revenues. See Perry Aff. ¶ 9. Moreover, there will be no way to obtain redress for such losses, since neither the competing carriers nor the Commission likely could be required to make GTE whole even if the rules are later struck down. The threat of such unrecoverable economic loss constitutes irreparable harm justifying a stay pending judicial review. See, e.g., Baker Elec. Corp., Inc. v. Cheske, 28 F.3d 1466, 1473 (8th Cir. 1994); Airlines Reporting Co. v. Barry, 825 F.2d 1220, 1226-29 (8th Cir. 1987).

III. A STAY PENDING JUDICIAL REVIEW WILL NOT HARM OTHER PARTIES AND WILL SERVE THE PUBLIC INTEREST.

A stay will cause no harm to other parties for the simple reason that the FCC's rules are not needed for the transition to local competition under the Act. As Congress envisioned, competitive entry into local markets will proceed on schedule through private negotiations and

[14] See also Basicomputer Corp. v. Scott, 973 F.2d 507, 512 (6th Cir. 1992) ("The loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute.").

state arbitrations even without those rules. Moreover, if the rules are ultimately upheld, agreements can be readily modified to comply with the Commission's prescribed national rules. Thus, if this Court grants a stay, American consumers will receive the benefits of local competition consistent with the statutory deadlines and the goal of promoting economically sound investment and entry.

For that very reason, many private negotiations have already gone forward and many were nearing completion when the Commission announced its rules. The bulk of the work of creating local competition can thus be achieved by private parties. Indeed, it would be ironic for potential entrants to argue that any delay in the Commission's regulations will harm them, when the paramount emphasis in the Act was to allow private negotiations to create the new market in local telephony largely unfettered by detailed federal regulations.

For similar reasons, the public interest in achieving the rapid and efficient introduction of competition in the local exchange will best be furthered by a stay pending judicial review. Privately negotiated agreements backed by arbitrations are the key mechanism Congress chose to facilitate the growth of local competition, and negotiations will continue under a stay. All sides to these negotiations have incentives to proceed and conclude agreements under the Act. New entrants will push forward to take advantage of opportunities in the local exchange market while incumbent LECs will want to earn fair compensation for interconnection arrangements required under the Act. A stay is thus entirely consistent with the public interest, since the system for creating local competition under the Act can go forward whether or not the Commission's rules are in place. If a stay is denied, however, there is a substantial risk that progress toward competition will be gravely impaired due to the false start created by the

Commission's unlawful rules and their immediate destructive effect on the system of free, private negotiation that Congress built into the Act.

CONCLUSION

For the foregoing reasons, this Court should stay the effectiveness of the Commission's First Report and Order in its entirety pending disposition of GTE's petition for review. At a minimum, the Court should stay the effectiveness of the pricing provisions in the Commission's rules, §§ 51.501-51.515, 51.601-51.611, 51.701-51.717. The Court should also expedite judicial review, so that any delay to the development of competition caused by the FCC's false start is minimized.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

GTE Service Corporation, GTE Alaska, Inc., GTE Arkansas Inc., GTE California Inc., GTE Florida Inc., GTE Midwest Inc., GTE South Inc., GTE Southwest, Inc. GTE North Inc., GTE Northwest Inc., GTE Hawaiian Telephone Company Inc., GTE West Coast Inc., Contel of California, Inc., Contel of Minnesota, Inc. and Contel of the South, Inc., Petitioners, v. Federal Communications Commission and United States of America, Respondents.	)	Case No. ______ (D.C. Circuit Case No. 96-1319) (Consolidated with Case No. 96-3321)

APPENDIX TO
MOTION FOR STAY PENDING JUDICIAL REVIEW
AND FOR EXPEDITED JUDICIAL REVIEW

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TAB A